OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

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To:

Hon. Timothy M. Witkowiak
Circuit Court Judge
Safety Building Courtroom, # 113
821 W. State Street
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jon Alfonso LaMendola
LaMendola Law Office
3900 W. Brown Deer Rd., #269
Brown Deer, WI 53209

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Michael Lorenzo Hayes 371990
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

You are hereby notified that the Court has entered the following opinion and order:

2015AP1343-CRNM State of Wisconsin v. Michael Lorenzo Hayes (L.C. # 2013CF3594)

Before Lundsten, Higginbotham and Sherman, JJ.

Michael Hayes appeals a judgment convicting him, following a three-day jury trial, of one count of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.05 (2013-14).[1] Attorney Jon LaMendola has filed a no-merit report concluding that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Hayes was sent a copy of the report, but he has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction.

Jury selection

On the first day of the two-day jury trial, after voir dire had been conducted and the court had dismissed all but thirteen selected jurors, Hayes's defense counsel informed the court on the record that she had mixed up jurors number 27 and 29. The mix-up occurred as follows: during a side bar after voir dire both parties agreed that juror 27 should be stricken for cause. After the attorneys used their peremptory strikes and after all prospective non-selected jurors had been dismissed, leaving thirteen prospective jurors, defense counsel informed the court that she had intended to ask that juror 29, rather than 27, be stricken for cause. Defense counsel then moved to strike juror 29 for cause, arguing that, although two rounds of questioning had been done with juror 29 in an attempt to rehabilitate her, counsel ultimately did not believe the juror could be fair. The court denied the motion to strike juror 29 for cause and thirteen jurors were sworn in, including juror 29. Defense counsel then stated on the record that, had she not confused the two jurors, she likely would have used a peremptory strike on juror 29. Juror 29 ultimately sat on the jury that convicted Hayes.

Voir dire revealed that juror 29 had a daughter who was a sexual assault victim. Juror 29 stated during voir dire that "[o]ur experiences have impact on how we think" and that, although she liked to think she could be fair and impartial, she couldn't "honestly say." When examined again later by defense counsel, juror 29 again stated that "our life experiences impact our

decisions" but, when asked by the court if her daughter's experience would impact her ability to be a juror in this case, she answered "I don't think so."

In the no-merit report, LaMendola applies a harmless error analysis to trial counsel's mistake of mixing up jurors 29 and 27, ultimately asserting that "appellate counsel cannot conclude that trial counsel was ineffective." Although LaMendola's use of the harmless error framework in this context is inapt, we agree with his ultimate conclusion that there would be no arguable merit to pursuing an ineffective assistance of counsel claim based on the mix-up with jurors 27 and 29. At most, counsel's error resulted in the loss of use of a peremptory strike against juror 29. There is no constitutional right to a peremptory challenge. *See* ***United States v. Martinez-Salazar***, 528 U.S. 304, 311 (2000); ***Rivera v. Illinois***, 556 U.S. 148, 152 (2009). Accordingly, the usual test for ineffective assistance of counsel would apply and, under that test, Hayes would have to show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Nothing in the record or the no-merit report suggests that Hayes could show that he suffered prejudice from juror 29 sitting on the jury. The circuit court correctly determined that juror 29 should not be removed for cause because there was no showing of bias. It is pure speculation as to whether a differently comprised jury would have reached a different result. Therefore, we agree with counsel's conclusion, though not his analysis, that any claim relating to counsel's mistake during voir dire would have no arguable merit on appeal.

Sufficiency of the Evidence

Any challenge to the jury's verdict for sufficient evidence also would lack arguable merit. When reviewing the sufficiency of the evidence, the test is whether "the evidence, viewed most

favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Here, in order for the jury to find Hayes guilty of armed robbery as a party to a crime, the State was required to prove that the victim was the owner of the property at issue and also that Hayes or his co-actor took and carried away the property from the victim or from the victim's presence, took the property with intent to steal, acted forcibly, and threatened to use a dangerous weapon at the time of the taking or carrying away of the property. *See* WIS JI—CRIMINAL 1480.

The criminal complaint alleged that the victim was in his car and had plans to meet a man on August 3, 2013, to sell him marijuana. The State elicited trial testimony from the victim that a man, whom the victim identified in court as Hayes, got into the victim's car and looked at the marijuana. The victim testified that a second man opened the back door of his car, pointed a gun at his head, and told him to empty his pockets. The victim further testified that Hayes opened the glove box and console. The victim stated that he was told to pop open the trunk and that, when he did so, Hayes and the other man took a duffel bag, tablet, and computer monitor. According to the victim, Hayes and his co-actor then left together with the victim's possessions. The victim believed the men left in a white car that he recognized as the same car Hayes had been in when the victim first met Hayes.

The State also introduced the testimony of an independent witness, A.M., who was standing outside in his neighborhood on August 3, 2013, and saw a person throw some things into a garbage bin, making a lot of noise. A.M. testified that the person had arrived in a white car. A.M. further testified that he later checked the garbage bin and saw a computer and other

items in the garbage bin, so he brought the items to the police station. A.M.'s mother, who had been inside the house, obtained license plate information from the white car.

The State introduced testimony from Police Officer Guy Fraley that he ran a search using the license plate information obtained by A.M.'s mother. The search results showed that the car had been stopped by police on August 2, 2013, and again in the early morning hours of August 4. The search results also showed that Hayes had been in the car on both occasions. On August 4, 2013, Fraley observed the white car in a driveway. Fraley waited until the vehicle began moving and then stopped the car. Fraley identified Hayes in court as the man who had been driving the car at the time of the stop. Fraley testified that he arrested Hayes and that, when he brought Hayes to the police station for questioning, Hayes admitted that he and another man had been in a car together to purchase marijuana from the victim. Fraley further testified that Hayes admitted that there had been a robbery but that Hayes denied that he was involved in it.

Travis Johnson, Hayes's co-actor, testified that he and Hayes had planned the robbery ahead of time. He stated that, at first, the plan had been only for Hayes to buy marijuana from the victim but that, when they arrived, Hayes decided he wanted to rob the victim. According to Johnson, Hayes got into the front seat and told Johnson to get in the back. Johnson pulled out a gun and pointed it at the victim while Hayes searched the victim's pockets. Johnson testified that both he and Hayes told the victim to give them everything he had. Johnson testified that Hayes went to the trunk and took bags out of it.

Hayes also testified at trial on his own behalf. Hayes's version of the events differed from the testimony given by other witnesses. Hayes admitted that he got into the victim's car for the purpose of purchasing marijuana from him. Hayes also testified that Johnson got into the

back seat with a gun and told the victim to give him all his belongings. Hayes testified that he was not expecting the robbery to happen. Hayes also denied rummaging through the glove box or taking money.

We acknowledge that Hayes's account of what happened differed from the testimony of other witnesses. However, when there is conflicting testimony, it is the jury's function to fairly resolve those conflicts. ***Poellinger***, 153 Wis. 2d at 506. Moreover, "the trier or fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused." ***Id.*** (emphasis omitted). Here, the jury heard Hayes's testimony about what happened, including his denial that he robbed the victim. Apparently, the jury did not find this part of Hayes's testimony to be credible. This court may not overturn the jury's credibility assessments unless they are inherently or patently incredible, which occurs when the relied-upon evidence is in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). That is not the case here. Accordingly, we are satisfied that evidence at trial was sufficient to support the conviction, such that there would be no arguable merit to challenging the convictions on appeal.

Admission of Drug-related evidence

The no-merit report concludes that any argument that counsel was ineffective for failing to object to the admission of evidence related to the drug transaction would be without merit. We agree. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence." WIS. STAT. § 904.03. Here, evidence related to the drug transaction was part of the defense strategy, in that it served to challenge the victim's credibility and bolster Hayes's account of what happened. Hayes testified that he met the victim for a drug transaction, nothing more, and that he did not know Johnson planned to rob the victim. Although evidence of the drug transaction also carried some prejudicial value, we agree with counsel that the danger of unfair prejudice was relatively low when compared with the reasonable strategic purpose for which the evidence was used, such that there would be no arguable merit to challenging trial counsel's failure to object to the admission of the evidence.

Waiver of the right not to testify

Hayes elected to testify at trial. His counsel asserts in the no-merit report that there would be no arguable merit to challenging the validity of Hayes's waiver of the right not to testify. "A criminal defendant's constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently." ***State v. Denson***, 2011 WI 70, ¶8, 335 Wis. 2d 681, 799 N.W.2d 831. However, "circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify," although conducting such a colloquy is the better practice. ***Id.*** Here, the court did engage in an in-person colloquy with Hayes and found that Hayes understood he had a right not to testify but elected to do so after discussing the issue with his counsel. Nothing in the record or the no-merit report suggests that Hayes's waiver of the right not to testify was not knowing, voluntary, and intelligent, such that any argument to the contrary would be without arguable merit on appeal.

Sentence

Finally, we agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. In imposing sentence, the court considered the gravity of the offense, the need to protect the public, and Hayes's need for rehabilitation. These are proper factors a court must consider in sentencing a defendant. The court imposed a sentence of seven years of initial confinement and seven years of extended supervision. The sentence was well within the maximum penalty range. *See* WIS. STAT. §§ 943.32(2), 939.05 (classifying armed robbery as a party to a crime as a Class C felony), 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). Under these circumstances, it cannot reasonably be argued that Hayes's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Jon LaMendola is relieved of any further representation of Michael Hayes in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals